

Environmental Health Coalition

COALICION de SALUD AMBIENTAL

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April 25, 2003

Chairman Jack Minan and Regional Board Members
Regional Water Quality Control Board
9174 Skypark Court
San Diego, California 92123-4340

RE: Environmental Health Coalition (“EHC”) Comments on Tentative Order No. R9-2003-0008, NPDES No. CA0109185, Waste Discharge Requirements for U.S. Navy, Naval Base Coronado, San Diego County

Dear Chairman Minan and Board Members:

Environmental Health Coalition (“EHC”) files the following comments on Tentative Order No. R9-2003-0008. EHC is a community-based environmental and social organization with members throughout the San Diego/Tijuana region.

While we applaud the Regional Board (the “Board”) for putting hard work and resources into regulating the Navy’s activities under the National Pollutant Discharge and Elimination System (“NPDES”), as with the other Navy permits that have preceded this one, EHC believes again that this Tentative Order (“Order”) does not go far enough in protecting this region’s precious water resources and, like the earlier Navy permit, does not properly implement all legal requirements.

As before, this Order not only fails to protect the San Diego Bay from toxic discharges, but also demonstrates the Regional Board’s unfair treatment of allowing the Navy, in some cases, to operate with less stringent regulations than comparable industries like commercial shipyards in the area.

San Diego Bay has hosted the Navy for many years which has resulted in degradation of water quality at the same time. It is now in the public’s interest to ensure that the Navy takes the necessary steps to restore the quality of our waters.

We are also disappointed with the Board’s continued unwillingness to implement numeric discharge effluent limitations for industrial stormwater discharges. Although the *Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays*,

and Estuaries of California (“ISWIP”) does not specifically require such limits to be set, EHC believes it does not prohibit the Board from setting them if limits are necessary to restore the quality of our waters. The Board has stated that such “numerical effluent limitations for storm water discharges are not feasible”¹ and that they are unaware of any such permits nationwide.

As this letter describes, we are happy to report to the Board that our own research has revealed that **there are a number of permits throughout the nation that currently have permits that set such limits.** The limits set in these permits are proof that limits are feasible, and the mere fact they exist is evidence that we should be striving toward the same manner of implementing protective measures. The CTR established the limits, and now we have a model for establishing the method of implementing them.

Finally, we understood that it was the intent of the Board to adopt all Navy permits based on the conditions issued in the Pt. Loma Submarine base permit. We supported that strategy as long as it was protective of the Bay. Unfortunately, we believe the Pt. Loma Submarine Base permit was not adequately protective of San Diego Bay’s beneficial uses and there were many issues that were not satisfactorily resolved. In addition, there are additional circumstances that now require a more protective permit for Naval Base Coronado.

I. GENERAL COMMENTS

A. Order does not consider requirements of Total Maximum Daily Load requirements and fails to set protection-based limits.

This area of the Bay is already listed as impaired waters under 303(d) for being heavily impacted by copper and is currently under the Total Maximum Daily Load (TMDL) program to reduce the inputs of copper. Nowhere in the Order, however, are TMDLs mentioned or taken into account. Allowing copper discharges in areas that can influence the copper loads violate the Clean Water Act and should not be allowed. Specifically, the area was listed under 303(d) due to its degraded benthic community and a TMDL currently exists specifically to protect this benthic community.

This Order also fails to set any protection-based limits. EHC raised our concerns on the use of the EPA Multi-Sector permit benchmark of 63.6 µg/L copper and 117 µg/L zinc as a de-facto “limits” in discharges in our comment on the Navy Submarine Base and US Naval Station permits and the concerns still stand for the current Order. In examination of the source of the EPA benchmark (Federal register Vol 65, No. 2110/ Monday, October 20 page 64766) it is noted that the selection of the benchmark has nothing to do with measured impacts on toxicity or water quality. The source of the benchmark is noted as being based on the “*minimum level (ML) base upon highest*

¹ California Regional Water Quality Control Board Response to the Petition of Divers’ Environmental Conservation Organization For Review of Regional Board Action on Order No. R9-2002-0169, NPDES Permit No. CA0109169 Waste Discharge Requirements for U.S. Navy Naval Base, San Diego, SWRCB/OCC File A-1531, p. 3.

Method Detection Limit (MDL) times a factor of 3.18." This is not an "effects-based" or protection-based limit.

B. Order fails to set effluent limitations consistent with the requirements of the California Toxics Rule.

The Order must conform to the CWA and the associated regulations issued by the U.S. Environmental Protection Agency ("EPA"). In accordance with the regulations, a "reasonable potential" analysis ("RPA") should have been performed in order to ascertain whether the Navy's discharges cause or have the potential to cause violations of the California Toxics Rule ("CTR"), which was issued pursuant to Section 303(c)(2)(B) of the CWA; unfortunately, this analysis was not done. Moreover, all NPDES permits must establish requirements necessary to satisfy Section 303 of the CWA; significantly, the Order does not have a single numeric effluent limitation for copper, zinc, or any other pollutant listed in the CTR.

According to CTR, maximum concentration and the continuous concentration for copper in the San Diego Bay may not exceed 4.8 µg/L and 3.1 µg/L, respectively; the corresponding limits for zinc are 90 µg/L and 81 µg/L, respectively. In addition, the Ocean Plan establishes copper concentrations for the ocean at 3.0 ppb median and 12 ppb for a daily maximum for the ocean, where dilution is far greater than in an enclosed bay like San Diego Bay.

Paragraph B-2 of the Order only requires the Navy to perform a series of tasks if industrial storm water discharges contain a copper concentration greater than 63 µg/L or zinc concentration greater than 117 µg/L. These threshold limits are significantly higher than concentration limits set in the CTR, which Paragraph C-1 of the Order requires the Navy to comply with. Furthermore, the permit draws no justification or basis for the concentration-based triggers. In order to make the necessary findings that that permit adequately implements the CTR and protects beneficial uses, the permit must draw a clear line of relationship to show that such limits will ensure compliance with CTR limits.

Although the SIP specifically states that it does not apply to the regulation of industrial stormwater, it does not specifically preempt a Regional Board from choosing to set numeric effluent limitations for stormwater discharges if there is a threat to water quality in the region.² In the San Diego region, industrial stormwater dischargers such as the Navy are the largest contributors to pollution in the Bay, especially for copper. Navy discharges are well-above CTR limits and therefore adversely impact the beneficial uses of the bay.

EHC has observed much confusion on how the SIP relates to industrial stormwater discharges. In the aforementioned Naval Station permit, this Board concluded that no limits were required to be set under the law, and cited the "exemption" in the Plan as their guidance. In addition, this Board has stated at meetings that they did

² Inlands Water Plan at 1, footnote 1: "This Policy does not apply to regulation of storm water discharges."

not know of any examples anywhere in the country where numeric effluent limitations were being set for stormwater discharges and that these limits were infeasible.

Numeric effluent limitations are required unless they are “infeasible,” in which case best management practices must be used instead. *See* 40 C.F.R. 122.44(k)(3). However, there is *absolutely no evidence* in the administrative record to show that numeric effluent limitations are infeasible with respect to CTR limitations, and the Regional Board has made no finding to this effect. Because every NPDES permit must include requirements essential for achieving “water quality standards established under Section 303 of the CWA,” *see* 40 C.F.R. § 122.44(d)(1), a numeric effluent limitation for each of the CTR’s 126 pollutants should have been set forth in the Tentative Order.

Aside from an argument based on infeasibility, which is not supported by the record, the only possible basis for not articulating numeric effluent limitations in the Tentative Order is that there was not enough data available for the Regional Board to calculate limitations. The Board claims that the available mathematical equation used to determine numerical effluent limitations (e.g. NPDES Permit Writer’s Manual, December 1996, Chapter 6, p. 102, Basic Mass Balance Water Quality Equation) cannot be used for storm water discharges unless numerous variables are accounted for or are assumed.³ Such a position is indefensible for two reasons.

In the first place, there is too little data for the Regional Board to consider because the Board itself has not adequately required the Navy to provide a full characterization of the constituents in its discharge; it would be hypocritical to argue that a decision could not be made due to a lack of data when the decision-maker who has the authority to ask for the data does not do so. More importantly, the water-quality criteria established by the CTR apply at the discharge point, meaning that there is no need to calculate dilution; even the most relaxed of numeric limitations could be *no higher* than those prescribed by the CTR. Nevertheless, other NPDES permits prove that numeric discharge limits for stormwater effluent are not only feasible, but also legally defensible and required.

1. Other NPDES permits exist throughout the nation that set numeric effluent limitations for copper in stormwater discharges, demonstrating that it is feasible to set these limits for industrial stormwater discharges.

Other NPDES permits throughout the country have successfully set numeric effluent limitations for copper in industrial storm water, demonstrating that it is indeed “feasible” to set these limits.

In Tacoma, Washington a NPDES permit exists for J.M. Martinac Shipbuilding Corporation, a shipyard, that sets numeric effluent limitations for industrial stormwater

³ See *Id.* at 9, *supra* note 1.

discharges for copper and zinc at .09 mg/L and 1.330 mg/L respectively.⁴ Staff members at the Department of Ecology in Washington State report that the permittee has been able to comply with this permit. In New Jersey a NPDES permit exists that sets copper effluent limitations for discharges of stormwater retained for use in minor industrial process and industrial wastewater (including stormwater), not to exceed 0.017 mg/L of copper for daily max.⁵ In Louisiana, a NPDES permit exists that sets effluent limits for stormwater discharges for copper at 0.1 mg/L daily max.⁶ In South Carolina, the Gaston Copper Recycling Corporation has numeric effluent limitation on copper concentrations for stormwater discharges set at 17 ug/L.⁷ These permits are testament to the fact that numeric effluent limitations for industrial stormwater discharges are both feasible and attainable. It is of serious concern that **States with such horrible track records such as New Jersey and Louisiana are ahead of our region in terms of innovation and protection of water resources.**

C. Order fails to comply with State anti-degradation policies.

Finding #16 states that the Order is in compliance with State Board Resolution No. 68-16 because a “anti-degradation analysis is not necessary since the Order protects existing instream water uses.” Compliance with the resolution, however, cannot be claimed since the limits are not established based on effects to existing beneficial uses.⁸

D. Navy permits should mirror or meet the same standard as comparable commercial shipyard facilities on the San Diego Bay.

There is no justification to apply a lower standard to Navy as opposed to commercial shipyards with comparable facilities and operations, especially since the size and scale of Navy operations are considerably larger and much of the work occurs at pier side and over water. For example, unlike the NPDES General Shipyard Permit, the Order exempts the Navy of effluent limitations for oil and grease, settleable solids, turbidity, pH, and temperature. Disparities such as this are unacceptable and set the precedent that the Navy can get away with more than commercial shipyards.

II. SPECIFIC COMMENTS

A. Order is ambiguous on what the Navy’s discharge requirements are and what are the consequences of noncompliance

Paragraph B-2 of the Order is ambiguous as to the following:

⁴ Washington State NPDES Waste Discharge Permit No. ST 6180, J.M. Martinac Shipbuilding Corporation, p. 4., section S1.A. Limitations based on monthly average, which is defined as the highest allowable average of daily discharges over a calendar month.

⁵ NPDES Permit no. NJ0004332, Yates Foil USA in Bordentown, New Jersey.

⁶ LPDES permit no. LA0073954, Evans Harvey Corp. in Harvey, Louisiana.

⁷ NPDES Permit No. SC0034541, South Carolina.

⁸ Water Code § 1324, Regional Boards are directed to establish “water quality objectives [to] ensure the reasonable protection of beneficial uses (environmental characteristics and water quality conditions).”

- (1) Whether the Navy can discharge *any* level of copper as long as they perform the required tasks when their discharge exceeds the concentration thresholds mentioned above; OR
- (2) Whether the Navy must perform the tasks if they exceed the thresholds, while also facing punishment for any discharge that violates the concentration requirements of CTR.

The Order must clarify this ambiguity. Interpretation (1) implies that the only result of noncompliance is the performance of the enumerated tasks. Interpretation (2) implies that in addition to compliance with State and Federal law, the Navy must perform certain tasks if their discharges exceed the threshold limits set.

Since the Order states that the Navy must comply with federal and state law, the Order must be revised to state that, in addition to complying with discharge requirements for copper and zinc under the CTR and anti-degradation policies, the Navy must also perform the enumerated tasks if their discharges exceed the stated thresholds. The Order must be revised to include numeric limits that ensure compliance with the State CTR.

B. Storm Water Runoff discharge limitations are not justified and will not be effective to protect beneficial uses.

See Section I.A above.

C. Order allows for toxic discharges without penalty or correction.

The permit should make clear that the Navy cannot just conduct a number of activities in order to achieve “compliance” in the event of an exceedence. The subsequent actions must result in compliance with the Order. This is not clear in the Tentative Order as written.

D. Order fails to require receiving water monitoring.

EHC reiterates our longstanding concern with receiving water limits that are not numeric/specific and for which no monitoring is required. The Board needs to make a finding that the receiving waters are protected. This finding is impossible to make if no monitoring of the receiving water is being done. This is a chronic and serious omission of a large majority of the permits that the Regional Board has issued for our largest and most significant polluters of San Diego Bay. The Board must act to address this omission.

E. Order should include progress reporting on diversion progress

Board needs to monitor progress for Navy compliance with storm water runoff from all high-risk areas so Navy can comply with 2-year deadline. The two-year time period for diversion is very generous. The Naval Station has been, or should have been, on notice since this debate took place over the Shipyard permit. If the Navy was truly to

meet their obligations to protect San Diego Bay, they have already had 5 years to put diversion and other Best Management Practices (“BMPs”) in place. The Regional Board should be stern with the Navy on this score and ensure that quarterly reports are filed to document the regular progress for the Navy so that we don’t arrive at the end of the two year period with the Navy failing to meet their permit condition.

F. Order improperly basis de-facto limits on EPA benchmark copper limits for freshwater, not salt water, and toxicity testing should be required.

Copper is generally less toxic to fresh water organisms than marine organisms. This fact is part of the complexity of copper and how it behaves in the environment. Copper changes depending on the salinity and pH of the medium and it can change forms, which can cause different effects. Since all of the other sources for the benchmark limits are freshwater limits, we are concerned that the EPA has based this opinion on freshwater effects and not marine life effects. It is the responsibility of the Regional Board to assess if 63.6 µg/L is an appropriate discharge level into marine water. This "limit" should be thrown out and toxicity testing, such as we require the shipyards around the Bay should be required.

III. CONCLUSION

EHC supports the Regional Board for taking the necessary steps to control the Navy’s pollution in the San Diego Bay. We, however, are concerned that the Tentative Order will not help to improve and restore the water quality and health of the San Diego Bay and coastline. Without any clear limitations or strict enforcement requirements, such as those that exist for comparable commercial shipyards, the Bay will continue to be threatened by Navy operations. As a result, EHC cannot support this Tentative Order. As a result, the Tentative Order must be revised to address our points raised above.

Thank you very much for the opportunity to comment on this important issue. If you need more information regarding the comments, please do not hesitate to contact us.

Sincerely,

Albert Huang
Policy Advocate
Clean Bay Campaign

cc.
Mr. John Robertus
Mr. Paul J. Richter